

**BOARD OF APPEALS
for
MONTGOMERY COUNTY**

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CASE NO. A-6598

PETITION OF NOILA AND WADE SORENSON

OPINION OF THE BOARD

(Opinion Adopted January 16, 2019)
(Worksession Held February 6, 2019)
(Effective Date of Opinion: February 13, 2019)

Case No. A-6598 is an application for a variance needed to allow construction of a shed. The proposed construction requires a variance of 4.70 feet as it is within 0.30 feet of the left lot line. The required setback is five (5) feet, in accordance with Section 59-4.4.9.B.2 of the Zoning Ordinance.

The Board held a hearing on the application on January 16, 2019, at which the Board voted to deny the requested variance. Petitioners Noila and Wade Sorenson appeared at the hearing in support of the application.

Subsequent to the Board's verbal denial, but prior to the issuance of its written decision, the Petitioners submitted a letter dated January 20, 2019, with attached photographs, requesting that the Board re-open their case to consider new information. The Board considered this request at its Worksession on February 6, 2019. Petitioners Noila and Wade Sorenson were again both present, in support of their variance application.

Decision of the Board: Variance **DENIED**.

EVIDENCE PRESENTED

1. The subject property is Lot 10, Block 1, Pinecrest Subdivision, located at 6407 5th Avenue, Takoma Park, MD, 20912, in the R-60 Zone. The subject property is over 6,000 square feet in size, and is rectangular in shape. The Petitioners moved into this home in April, 2018. See Exhibits 3 and 4(a)-(c).
2. The Petitioners' Statement of Justification ("Statement") notes that the variance that the Petitioners are seeking is needed to install an 8' x 12' storage shed in the rear southeast

corner of their backyard. The Statement indicates that this variance request is “based on the topographical conditions that are specific to our property in Takoma Park,” describing those conditions as follows:

Our property is located on a fairly steep hill. Our neighbor's property at 6409 5th Ave, which borders our property to the east (left side), is located several feet lower than our property because of the topography of the area. There is a large gap of approximately 15.5 feet wide and a steep drop of about 4 feet in this corner of the backyard along the left property line. The rest of the left property line leading up to this area is lined with a cinder block retaining wall and a wood fence placed on top of it on our side as well as a chain link fence which runs along the base of the retaining wall on the neighbor's side.

This portion of our backyard is unique to the area and has an unusual shape and design for Takoma Park. The cinder block retaining wall that was set up between the two properties (which seems to have been put in place when the homes were originally built – i.e. 1959) served to level the backyards but created this significant height difference between the ground levels of the properties. The retaining wall doesn't extend all the way to the rear property line. As a result, our wood fence stops approximately 15.5 feet short, leaving an unusually large wide gap between the rear property line and where the fence ends. Since there is no cinder block retaining wall in this section of the property line, the ground is does not seem to be stable enough to install/extend the fence.

In this open area, there is a steep drop of nearly 4 feet into our neighbor's lot (onto a cement slab). This large section, which is completely open and very dangerous, poses a serious hazard to anyone (especially children) who might fall into the neighbor's property since there isn't a sufficient fence or barrier between our properties.

The Statement goes on to assert that placing the proposed shed within 0.3 feet of the property line will create a barrier to this unsafe area and prevent injurious falls. It further states that “[t]he unfenced area in the southeast corner of the backyard and the space that has been created between the properties seem to have been created by a shed built in this area by previous owners of the property. Even though this old shed is no longer there, based on Google Maps (attached pictures) we were able to determine that a storage shed had previously existed in this same location since 2007.” See Exhibit 3.

3. The Statement at Exhibit 3 asserts that the proposed shed “would not be easily visible from the street.” It goes on to state the following with respect to the impact of the proposed shed on neighboring properties:

The only neighbor who might be affected by the new shed location is our neighbor who lives at 6409 5th Ave. We consulted them about our project and they did not have any objections to the new placement of the shed. To note, this new placement of the shed would be in the far corner of both of our properties. Since each of our

properties hits up against a steep retaining wall (20+ feet) in the rear, the change in location of the shed would not have any impact on the rear property view.

4. The Statement at Exhibit 3 notes that the requested variance is the minimum necessary to overcome the practical difficulties that full compliance with the Zoning Ordinance would cause because “[i]f we place the shed 5 feet away from the property line as required by R-60 setback standards for Montgomery County, there would be an opening of approximately 86” wide (from the corner of the shed to the corner of the wood fence), which would make this unsafe portion of our yard easily accessible by children,” and that the results of a child falling four feet to a concrete pad could be injurious or fatal.

5. At the hearing, Petitioner Wade Sorenson testified that he and his wife purchased the subject property in 2018. He testified that the back yard is fully fenced except for the rear corner on the left side, where there is a four (4) foot drop from the subject property to the neighbor’s property. He testified that there is a cement slab on his neighbor’s property at the bottom of this drop-off, and that for safety reasons, he and his wife would like to use the proposed accessory structure to block the drop-off.

Mr. Sorenson testified that the subject property has topographical issues. He testified that their house is located on a hill that is so steep that cars cannot drive up it in the snow, stating that the property to the right of the subject property (as one faces the Petitioners’ house from the street) is much higher than the subject property, and the property to the left is lower. He testified that there is a retaining wall, three feet or taller, between the subject property and the property to the left, but that the retaining wall stops where the Petitioners’ fence stops. Mr. Sorenson testified that he and his wife had several fencing companies come out to their property last summer to discuss fencing the unfenced portion of their property along that shared property line (i.e. the left rear side). He testified that all of the fencers either would not or were reluctant to install fencing along that corner of the property due to the lack of retaining wall in that area. Petitioner Noila Sorenson testified that the fencers said there was no solid ground in that area to hold a fence. She testified that their neighbors’ fence had moved away from the shared property line because of water problems. Mr. Sorenson explained that because of this, even if the Petitioners’ proposed shed were located on the shared property line, there would still be a gap of over two feet between the proposed shed and the neighbors’ fence.

In response to Board questions, Mr. Sorenson testified that there is a concrete slab in the rear of the subject property. See Exhibit 4(b) (showing a 15’ deep x 37.6’ wide concrete slab extending across the rear of the subject property). When asked if they were planning to use this existing slab as a foundation for the proposed shed, Mr. Sorenson stated that they intended to put the shed on cinder blocks or other square blocks. Mrs. Sorenson then clarified that a portion of the proposed shed would be located on the existing slab. See Exhibits 5(h)-(j) (showing the proposed location of the shed). When asked if the shed could be located five (5) feet from the property line, presumably on the existing slab, and new fencing could be run from the end of the existing fence to the shed, Ms. Sorenson testified that it was possible to move the shed to comport with the five-foot setback, but that that was

not optimal. She testified that their neighbors did not object to the Petitioners locating their shed in the position they have proposed, 0.3 feet from the shared lot line.

6. At its February 6, 2019, Worksession, the Board considered the Petitioners' January 20, 2019, correspondence, including the attached photographs. See Exhibit 12. The Petitioners' correspondence states that the Petitioners cannot place fencing between the existing fence and a shed that is located in compliance with the setbacks (i.e. at least five (5) feet back from the side lot line) because that would place the fence in very close proximity to an existing swale and drainage system/point, and in addition to potentially damaging this existing drainage system, would serve as a barrier that could divert water and debris onto their neighbors' property. The Petitioners' correspondence also notes that the fence itself would collect debris, which would be difficult to clean. It states that their shed, if placed in close proximity to the side lot line as originally proposed, would not cause such problems because it would be placed on cinder blocks and water could flow underneath it.

7. At the Worksession, the Petitioners stated that following the hearing in January, they went home to consider what would happen if they were to locate the proposed shed in accordance with the required setbacks, and then were to fence the area between their existing fence and the (compliant) shed. They stated that they realized that this would likely direct water onto their neighbors' property, which they indicated would be unacceptable to them and to their neighbors. They described the water problems in their back yard, and indicated that water problems have been an on-going source of contention in the neighborhood. In response to a Board question about the effect of the existing fence on water flow, the Petitioners stated that at present, the water flows down the fence and does not enter the neighbors' property. The Petitioners stated that the photographs submitted with their January 20, 2019, correspondence show a drainage point in the location where a fence connecting the existing fence with a compliant shed would be located. They expressed concern about debris collecting along the contemplated fencing, and an inability to clean that area of their property which would be behind that fence. They stated that if the fence were raised off the ground, a child could crawl underneath it. The Petitioners indicated in response to Board questioning that the grant of the requested variance to allow the shed to be located very close to the side lot line would solve their child safety problems, and that with respect to drainage, while the shed could be placed eight (8) or more inches above ground on cinder blocks, thus allowing more room for water to flow underneath, a fence could only be placed three (3) inches above ground.

CONCLUSIONS OF LAW

1. Section 59-7.3.2.E of the Montgomery County Zoning Ordinance, "Necessary Findings," provides that in order to grant a variance, the Board of Appeals must find that:

(1) denying the variance would result in no reasonable use of the property; or

(2) each of the following apply:

- a. one or more of the following unusual or extraordinary situations or conditions exist:
 - i. exceptional narrowness, shallowness, shape, topographical conditions, or other extraordinary conditions peculiar to a specific property;
 - ii. the proposed development uses an existing legal nonconforming property or structure;
 - iii. the proposed development contains environmentally sensitive features or buffers;
 - iv. the proposed development contains a historically significant property or structure; or
 - v. the proposed development substantially conforms with the established historic or traditional development pattern of a street or neighborhood;
- b. the special circumstances or conditions are not the result of actions by the applicant;
- c. the requested variance is the minimum necessary to overcome the practical difficulties that full compliance with this Chapter would impose due to the unusual or extraordinary situations or conditions on the property;
- d. the variance can be granted without substantial impairment to the intent and integrity of the general plan and the applicable master plan; and
- e. granting the variance will not be adverse to the use and enjoyment of abutting or confronting properties.

Section 59-7.1.1 of the Montgomery County Zoning Ordinance provides that the applicant has the burden of production and has the burden of proof by a preponderance of the evidence on all questions of fact.

2. The Board notes, based on the record in this case, that there was no attempt to argue the standard in Section 59-7.3.2.E.1 of the Zoning Ordinance. For this reason, the Board must analyze the instant case under Section 59-7.3.2.E.2 of the Zoning Ordinance. Section 59-7.3.2.E.2 sets forth a five-part, conjunctive ('and") test for the grant of a variance, and thus the Board cannot grant a variance if an applicant fails to meet any of the five elements required by this Section.

Based on the Petitioners' binding testimony and the evidence of record, the Board finds that the variance to permit the proposed construction of an accessory building 0.30 feet from the side lot line, requiring a variance of 4.70 feet from the otherwise applicable five (5) foot setback, fails to meet Section 59-7.3.2.E.2.a, and accordingly must be denied.

In support of this denial, the Board finds that despite the discussion of topography and elevation differences, the Petitioners have not demonstrated that the subject property itself has any unusual or extraordinary situations or conditions for the purposes of meeting Section 59-7.3.2.E.2.a.i that would prevent the location of the proposed shed in compliance with the required side lot line setback. Indeed, the Board notes that the Petitioners testified in response to Board questioning that there is a large, existing concrete slab in their rear yard, and that their proposed storage shed could be located five (5) feet from the side lot line, in compliance with the side lot line setback (and presumably on that slab), but that that would not accomplish their goal of using the shed to block an unfenced area of their property and the four (4) foot drop-off between their property and the abutting property. While the Board appreciates the Petitioners' goal of using their proposed accessory structure as a barrier to block this drop-off, the lower elevation of the neighboring property does not make the Petitioners' property unique, and does not preclude the location of the proposed structure on the subject property in compliance with the setbacks. Indeed, the Board finds that the evidence of record, including the topographic map submitted with Exhibit 12, indicates that a large portion of the Petitioners' back yard is relatively level. The Board notes that there is a large concrete slab across the Petitioners' rear yard, and that the Petitioners' submitted Statement indicates that the retaining wall between the subject property and their neighbors' property "served to level the backyards" of the respective properties. See Exhibits 3 and 4(a)-(c). Thus the Board finds that the Petitioners' property, in its current state, is not affected by topography such that a shed could not be located on the property in compliance with the five (5) foot setback from the side lot line, and that further makes an affirmative finding, based on the evidence of record and per the testimony of the Petitioners, that the proposed shed could be located on the property in compliance with that setback. Having found that the Petitioners do not satisfy Section 59-7.3.2.E.2.a.i of the Zoning Ordinance, the Board now addresses the remaining elements of the variance test in Section 59-7.3.2.E.2.a.

Although the Petitioners attempt in their Statement to address Sections 59-7.3.2.E.2.a.ii and iii of the Zoning Ordinance by stating that based on Google Maps, there was previously a shed in the same location they are proposing, and by stating that they had applied for a Takoma Park Tree Impact Assessment, and that no tree protection permit was required, the Board finds that this does not constitute evidence that the proposed development uses an existing legal nonconforming property or structure or that the proposed development contains environmentally sensitive features or buffers. See Exhibits 3, 5(k), 5(l) and 7.

The Petitioners do not attempt to address Section 59-7.3.2.E.2.a.iv of the Zoning Ordinance. With respect to Section 59-7.3.2.E.2.a.v, the Petitioners indicate that because the shed would not be easily visible from the street, would not alter the view of their property from the abutting property to the rear, and "would not have any effect on the aesthetics of the neighborhood," they assume that it substantially conforms with the established historic or traditional development pattern of their street or neighborhood and state that it "definitely does not interfere with or in any way alter" that pattern. See Exhibit 3. The Board finds that this element of the variance test requires an affirmative showing that the proposed development conforms with the established historic or traditional development pattern of

the street or neighborhood, not an assertion that it will not impact that pattern or affect established or traditional views. Thus the Board finds that the Petitioners' application does not satisfy Section 59-7.3.2.E.2.a.v of the Zoning Ordinance.

Having found, for the reasons set forth above, that the application fails to meet Section 59-7.3.2.E.2.a, the Board need not address the remaining elements of the variance test which, as previously noted, is conjunctive. Thus at the close of its January 16, 2019, hearing, on a motion by John H. Pentecost, Chair, seconded by Katherine Freeman, with Stanley B. Boyd, Vice Chair, and Bruce Goldensohn in agreement, the Board voted to deny the requested variance.

With respect to the Petitioners' January 20, 2019, correspondence, considered by the Board at its February 6, 2019, Worksession, the Board notes that pursuant to Rule 10.1.2 of the Board's Rules of Procedure, the Board can only grant reconsideration of its earlier decision "on evidence of changed circumstances, new evidence that could not reasonably have been presented at the original hearing, or if some mistake or misrepresentation was made at the original hearing that requires rehearing and reargument in order to be corrected." While the Petitioners have asserted that the information included in their January 20, 2019, correspondence, pertaining to water and drainage problems in the rear of their property, is new evidence that could not reasonably have been presented at their hearing, the Board disagrees, as those conditions did not arise in the time since the Board's January 16, 2019, hearing, and thus could have been raised at that hearing. Were the Board to consider those conditions, the Board notes that the requested variance is for the location of an accessory structure (shed), not for a fence, and that the drainage problems that the Petitioners indicate could or would be caused by fencing the area between their existing fence and a shed that is located in compliance with the setback requirements do not change the Board's finding that the proposed shed can be located on the subject property in accordance with the required setbacks. Accordingly, for the reasons previously set forth in this Opinion, the Board reaffirms its initial decision to deny the requested variance.

On a motion by John H. Pentecost, Chair, seconded by Katherine Freeman, with Bruce Goldensohn in agreement and Stanley B. Boyd, Vice Chair, not in agreement, the Board again voted to deny the requested variance, and adopted the following Resolution:

BE IT RESOLVED by the Board of Appeals for Montgomery County, Maryland that the opinion stated above is adopted as the Resolution required by law as its decision on the above-entitled petition.



John H. Pentecost, Chair
Montgomery County Board of Appeals

Entered in the Opinion Book
of the Board of Appeals for
Montgomery County, Maryland
this 13th day of February, 2019.


Barbara Jay
Executive Director

NOTE:

Any request for rehearing or reconsideration must be filed within fifteen (15) days after the date the Opinion is mailed and entered in the Opinion Book. Please see the Board's Rules of Procedure for specific instructions for requesting reconsideration.

Any decision by the County Board of Appeals may, within thirty (30) days after the decision is rendered, be appealed by any person aggrieved by the decision of the Board and a party to the proceeding before it, to the Circuit Court for Montgomery County, in accordance with the Maryland Rules of Procedure. It is each party's responsibility to participate in the Circuit Court action to protect their respective interests. In short, as a party you have a right to protect your interests in this matter by participating in the Circuit Court proceedings, and this right is unaffected by any participation by the County.